SUBRAMANIAM SHANMUGAM

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR
MOHD GHAZALI YUSOFF J
[CRIMINAL APPEAL NO: 42-38-2000]
22 OCTOBER 2002

CRIMINAL PROCEDURE: *Charges - Framing or particulars of - False evidence - Penal Code, s. 192 - Whether charge was precise - Date of commission of offence - Whether erroneous*

CRIMINAL PROCEDURE: *Witness - Recalling of - Amendment of charge - Trial judge summarily dismissed application to recall witnesses - Criminal Procedure Code, s. 162 - Whether proper - Whether occasioned a miscarriage of justice*

One Yew Chin Eng had filed an action through a law firm to recover RM650,000 from one Ibrahim and one Tengku Iskandar. The appellant, Subramaniam, had affirmed that he served the writ for the law firm on Ibrahim and Tengku Iskandar on Monday, 30 January 1987, when it was actually a Friday. The appellant had also endorsed at the back of the writ that the day in question was a Monday. On the 13 April 1987, the law firm filed an affidavit of service based on the appellant's affirmation. On the same date, acting on the premise that Ibrahim and Tengku Iskandar had failed to enter appearance, Yew entered a final judgment against them. Yew then commenced bankruptcy proceedings against Tengku Iskandar which resulted in the latter being adjudicated a bankrupt.

Some time later, Tengku Iskandar lodged a police report, alleging that the law firm had used an affidavit which contained a false statement, in that the appellant had falsely stated that the writ had been served on a Monday when it was actually Friday. The prosecution arrested the appellant and in the main charge, it was alleged that the appellant had committed an offence under s. 193 of the Penal Code for giving false evidence in the High Court on 13 April 1987. At the close of the prosecution's case, the Sessions Court judge held that it had proven its case beyond a reasonable doubt based on the charge preferred and ordered the appellant to enter defence. At the close of the defence case, the trial judge amended the charge. However, he did not accede to the appellant's application to re-call witnesses but found him guilty as per the amended charge and sentenced him to 10 months' imprisonment.

The appellant appealed to this court on the following grounds:

i) that there was doubt on the credibility of Tengku Iskandar;

ii) that he had been wrongly charged under s. 193 of the Penal Code; and

iii) that the trial judge had wrongly refused to allow him to recall witnesses after amending the charge.

Held:

[1] The charge framed in the instant case was not very precise. The prosecution stated in the main charge that 13 April 1987 was the date the appellant had committed the offence of giving false evidence at the High Court when this was not the case. Based on the circumstances, and on that charge, the trial judge was not in a position to call upon the appellant to enter his defence. (pp 714 f-g & 718 d)

[2] It is mandatory under s. 162 of the CPC to allow recalling of witnesses where a charge is altered. In the present case, the trial judge ought to have inquired into the reason for the application by the accused and allow him to identify the witnesses to be recalled instead of summarily dismissing the said application. This failure vitiates the trial as it occasioned a miscarriage of justice. (pp 717 b-e & 718 e)

[3] When the onus is cast upon the accused to provide an explanation, and the explanation is given, the court is duty bound to consider whether it might reasonably be true, although not convinced with of its truth – Per Shaik Daud JCA in Ganapathy Rengasamy. Here, there was evidence that the trial judge had used his personal knowledge, which was not supported by evidence, in his attempt to reinforce the finding of the court at the close of the prosecution's case. (pp 717 f-g & 718 b)

[4] On the present facts, there was nothing to show that the trial judge had carried out a maximum evaluation of the evidence adduced by the prosecution, especially in relation to Tengku Iskandar's evidence, when he ruled that the prosecution had proved its case beyond reasonable doubt at the close of its case. (p 718 d)

[Appeal allowed; conviction set aside and appellant acquitted.]

Case(s) referred to:
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 CA ***(refd)***
Baban Singh v. Jagdish Singh AIR [1967] Cri LJ 6 ***(refd)***
Ganapathy Rengasamy v. PP [1998] 2 CLJ 1 SC ***(refd)***
Khoo Hi Chiang v. PP [1994] 2 CLJ 151 SC ***(refd)***
Oh Keng Seng v. PP [1976] 1 MLJ 143 ***(refd)***
PP v. Tan Kim Kang & Ors [1962] 28 MLJ 388 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 158, 162, 180, 261
Penal Code, ss. 191, 192, 193
Rules of the High Court 1980, O. 12 r. 4, O. 13 r. 1(1)

Indian Penal Code, ss. 191, 192, 199

Other source(s) referred to:
Ratanlal & Dhirajlal, *Law of Crimes*, 24th edn, pp 799, 809, 835

For the plaintiff - Ranjit Singh; M/s K Ranjit Singh & Partners
For the respondent - Ahmad Bache DPP

Reported by M Maheswaran

JUDGMENT

Mohd Ghazali Yusoff J:
The appellant was charged with an offence under s. 193 of the Penal Code ("the Code"). The main charge against the appellant read as follows:

> **PERTUDUHAN**
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> Bahawa kamu pada 13.4.1987 di Mahkamah Tinggi (1) Bahagian Dagang Kuala Lumpur didalam Wilayah Persekutuan, telah memberi keterangan palsu dengan niat untuk digunakan dalam prosiding Sivil Guaman No. C1-23-3323-86, dimana keterangan palsu tersebut telah dibuat dalam suatu afidavit yang diikrar oleh kamu dan didaftarkan di mahkamah tersebut dan kamu telah menyatakan dalam afidavit tersebut perkataan-perkataan yang digariskan dalam lampiran "A2" yang dilampirkan bersama dan perkataan-perkataan yang digariskan tersebut kamu tahu atau percaya adalah palsu atau tidak percaya sebagai benar. Oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah cabang pertama kepada seksyen 193 Kanun Keseksaan.

An alternative charge was also preferred against the appellant and it read:

PERTUDUHAN PILIHAN

Bahawa kamu pada 13.4.1987 di Mahkamah Tinggi (1) Bahagian Dagang Kuala Lumpur di dalam Wilayah Persekutuan, dalam sebuah akuan yang dibuat oleh kamu yang boleh diterima di sisi undang-undang oleh mahkamah tersebut sebagai keterangan iaitu satu afidavit yang didaftarkan di Mahkamah tersebut, telah membuat pernyataan palsu dalam afidavit tersebut sepertimana yang digariskan dalam lampiran "A2" yang dilampirkan bersama dan pernyataan palsu tersebut adalah berkenaan dengan satu perkara material kepada tujuan afidavit tersebut dan pernyataan palsu tersebut kamu tahu atau percaya adalah palsu atau tidak percaya sebagai benar. Oleh itu kamu telah melakukan satu kesalahan di bawah seksyen 199 Kanun Keseksaan yang boleh dihukum di bawah cabang pertama kepada seksyen 193 Kanun Keseksaan.

The background to the main charge and the alternative charge being preferred against the appellant is as follows:

(1) By writ of summons dated 7 October 1986, one Yew Chin Eng @ Yew Chee Ying (the plaintiff) sued one Ibrahim bin Mohd Said (the 1st defendant) and one Tengku Iskandar bin Tengku Ahmad (the 2nd defendant) (SP3) for the sum of RM650,000. Solicitors for the plaintiff, M/s Murthi & Partners filed the action on 9 October 1986 in the High Court, Kuala Lumpur. The suit was registered as civil suit No. C1-23-3323-86.

(2) On 13 April 1987, M/s Murthi & Partners filed an affidavit of service of the writ of summons on SP3 (exh. P3) which was affirmed by the appellant on 4 April 1987 before one K. Murugappan, Commissioner of Oaths (SP2) whose place of business is at No. 38, Jalan Dato Hamzah, Klang. It read:

I was entrusted with the service of the Writ of Summons on the abovenamed 2nd defendant at the instructions of M/s Murthi & Partners of No. 9B, Jalan Station, 41000 Klang, Selangor, Solicitors of the Plaintiff, Yew Chin Eng @ Yew Chee Ying.

2. I did on Monday the 30th day of January, 1987 at 11.45 in the morning at the 2nd Defendant's office at Room 9, 4th Floor, Bangunan LUTH, Jalan Dato Pati, Kota Bahru, Kelantan. I personally served on the Defendant with a true copy of the Writ of Summons which appeared to me, to have been regularly issued out of the Registrar of the High Court, Kuala Lumpur against the Defendants in the abovenamed suit by the abovenamed Plaintiff, Yew Chin Eng @ Yew Chee Ying dated 9/10/86.

3. The said 2nd Defendant admitted to me that he was the 2nd Defendant. However he did not accept the service of the Writ of Summons.

4. I left a copy of the Writ of Summons near him.

5. I did on Monday the 30th day of January, 1987 at 11.55 in the morning indorsed on the sealed copy of the Writ of Summons, the day of the month and week of the said service on the 2nd Defendant.

6. Annexed hereto and marked "SS1" is a sealed copy of the Writ of Summons with my own indorsement of service.

The endorsement on the back of the writ of summons which is in the appellant's handwriting read:

I, S. Subramaniam (NRIC No. 5759116) did on Monday the 30th day of January, 1987 personally serve the 2nd Defendant, Tengku Iskandar bin Tengku Ahmad, at 11.45am with the true copy of the Writ of Summons at his office, Room 9, 4th Floor, Bangunan LUTH, Jalan Dato Pati, Kota Bahru, Kelantan and endorsed at the back of this Writ of Summons at 11.50am.

(Sign.)
11.50am

(3) On the same date, ie, 13 April 1987 on the basis that SP3 failed to enter appearance after the time limited for appearing, the plaintiff entered final judgment against him. The order relating to the final judgment read:

JUDGMENT

No Appearance having been entered by the 2nd Defendant herein IT IS THIS ADJUDGED that the 2nd Defendant do pay the Plaintiff the sum of $650,000.00 (Ringgit Six Hundred and Fifty Thousand only) together with interest at the rate of 8% per annum from the 3rd day of May, 1985 to the date of realisation and the sum of $225.00 as costs.

Dated 13th day of April, 1987.

(Sign)
SENIOR ASSISTANT REGISTRAR
HIGH COURT
KUALA LUMPUR

(4) The plaintiff subsequently commenced bankruptcy proceedings against SP3 and on 27 September 1990 a receiving order and an order of adjudication were made against the latter.

(5) On 12 September 1996, ie, about six years later after he was adjudicated a bankrupt, SP3 lodged a police report (exh. P4) upon being "informed" that M/s. Murthi & Partners "which made him a bankrupt" used an affidavit of service which contained a false statement. The appellant was subsequently arrested and charged.

At the trial in the Sessions Court, SP3 contended the writ of summons was never served on him and that he has never met the appellant nor seen him before the trial. He agreed that the address where the appellant allegedly served the writ of summons on him was his office but contended it was closed that day, *viz*., 30 January 1987 it being a Friday and hence a public holiday in Kelantan. Furthermore it was the second day of the Chinese New Year. He then insisted that his diary (exh. P5) showed on 30 January 1987 he was at his house in Pasir Mas. On that day his friend, one Ramli bin Ahmad (SP4) came to his house in the morning. He then went for Friday prayers and returned home where he waited for one Pengiran Sufri, an acquaintance from overseas. Upon his arrival they went to Thailand.

In his evidence SP4 stated he was at SP3's house between 9am and 5pm on 30 January 1987. After the Friday prayers he had lunch with SP3 at the latter's house. At about 3pm that day one Jeffri, an overseas acquaintance of SP3, came to the said house and they then went to Rantau Panjang. They returned after 5pm.

SP5, an acquaintance of SP3, stated that sometime in June 1995 he came to know from the newspapers that SP3 was made a bankrupt. He managed to see one MS Murthi (SP6) of M/s. Murthi & Partners and was shown the cause papers relating to the said civil suit and the bankruptcy proceedings against SP3. He later made a visit to the High Court situated in Wisma Denmark, Kuala Lumpur and managed to obtain copies of the relevant cause papers and a copy of the said affidavit of service sworn by the appellant. He then noticed that the appellant had stated therein that the writ of summons was served on Monday 30 January 1987 whereas his computer calendar showed that that day was a Friday. He also noticed that the endorsement made by the appellant at the back of the writ of summons referred to that date as being a Monday. He later gave copies of the said cause papers to SP3 for his information. When he paid SP3 a visit, SP3 checked his diary (exh. P5) and informed him that on 30 January 1987 he was not in Kota Bharu.

SP6 confirmed that his legal firm handled the said civil suit. He stated the appellant had approached him and offered his services to serve the said writ of summons on SP3. He pointed out that on 15 July 1996 SP3 applied to set aside the bankruptcy order made against him but was not successful.

At the close of the prosecution's case, the learned Sessions Court judge found that the prosecution has proved its case beyond reasonable doubt on the main charge and also the alternative charge and ordered the appellant to enter on his defence on the main charge. In his evidence, the appellant stated that the affidavit of service (exh. P3) was prepared by M/s. Murthi & Partners and he signed it on 4 April 1987. He then pointed out that on 13 April 1987, ie, the

date as stated in the main charge, he did not give any evidence in the High Court, Kuala Lumpur as alleged therein. With regards to the service of the writ of summons, he related that at about 12 midnight on 29 January 1987 he left Klang in his own vehicle for Kota Bahru accompanied by a couple of friends including one Srivaji a/l Kamachi (SD2) and arrived there at about 9.30am the following day, ie, 30 January 1987. At about 10.30am he went to SP3's office together with SD2 by entering the back-door of the LUTH Building but found that the door to SP3's office was locked. They then went for a drink. He returned at about 11.30am with SD2 and met SP3 who was standing outside his office. Upon informing the purpose of his visit, SP3 refused to accept service of the writ of summons. He then left the writ of summons on the floor in front of the office door and left. The appellant stated he now knows that 30 January 1987 was a Friday and admitted that the word "Monday" stated in his endorsement on the back of the writ and his affidavit was erroneous. He however denied that he has sworn a false affidavit as alleged.

At the close of the defence case, the learned Sessions Court judge, pursuant to s. 158 of the Criminal Procedure Code ('CPC'), amended the charge to read as follows:

> TUDUHAN PINDAAN OLEH MAHKAMAH
>
> Bahawa kamu pada 4.4.1987 jam 11 pagi di No. 39 Dato Hamzah, Klang telah dengan sengaja mereka keterangan palsu untuk digunakan dalam prosiding Sivil No. C1-23-3323-86 di mana keterangan palsu tersebut telah dibuat dalam satu afidavit yang diikrar oleh kamu dan kamu telah menyatakan dalam afidavit perkataan-perkataan yang digariskan dalam lampiran A dan oleh demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah cabang pertama kepada seksyen 193 Kanun Keseksaan.

Section 158 of the CPC read:

(1) Any court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

The notes of proceedings recorded by the learned Sessions Court judge showed that the amended charge was read and explained to the appellant and he maintained his plea of not guilty. The notes also showed that counsel for the appellant requested that he be allowed to recall witnesses but that application was turned down. The learned Sessions Court judge then went on to find the appellant guilty of the charge as amended and sentenced him to 10 months' imprisonment.

At the appeal counsel for the appellant raised three issues, namely:

(i) the credibility of SP3;

(ii) that the appellant has been wrongly charged under s. 193 of the Code; and

(iii) the refusal of the learned Sessions Court judge to allow him to recall witnesses after amending the charge at the close of the defence case.

Section 193 of the Code read:

> Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine; and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine.

Section 191 of the Code read:

> Whoever, being legally bound by an oath, or by any express provision of law to state the truth, or being bound by law to make a declaration upon any subject, makes any statement which is false, and which he either knows or believes to be false, or does not believe to be true, is said to give false evidence.

Section 192 of the Code read:

> Whoever causes any circumstance to exist, or makes any false entry in any book or record, or makes any document containing a false statement, intending that such circumstance, false entry, or false statement may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator, and that such circumstance, false entry or false statement, so appearing in evidence, may cause any person, who in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding, is said "to fabricate false evidence".

Section 193 of the Code is a punishment provision. That provision specifies the punishment which can be inflicted for offences described in ss. 191 and 192 of the Code, ie, giving false evidence and fabricating false evidence, respectively. In dealing with s. 191 of the Indian Penal Code which is in *pari materia* with our s. 191 of the Code, Ratanlal & Dhirajlal's *Law of Crimes* (24th edn) at p. 799 states the offence involves three ingredients, namely:

(i) a person must be legally bound (a) by an oath, or any express provisions of law, to state the truth, or (b) to make a declaration upon any subject;

(ii) he must make a false statement;

(iii) he must know or believe it to be false, or must not believe it to be true.

In dealing with s. 192 of the Indian Penal Code which is in *pari materia* with our s. 192 of the Code, Ratanlal & Dhirajlal's *Law of Crimes* (24th edn) at p. 809 states the section deals with fabricating false evidence and "the wording of this section is so general as to cover any species of crime which consists in the endeavour to injure another by supplying false data upon which to rest a judicial decision" and that the following are the ingredients of the offence, namely:

(i) (a) causing any circumstance to exist, or (b) making a false entry in a book or record, or (c) making a false document containing a false statement;

(ii) that such circumstance, false entry or false statement must have been intended to appear in evidence in (a) a judicial proceeding, or (b) a proceeding taken by law before a public servant or an arbitrator;

(iii) that it was intended that such circumstance, false entry or false statement so appearing in evidence, might cause any person, who in such proceeding, is to form an opinion upon the evidence, to entertain an erroneous opinion;

(iv) the formation of opinion should be touching any point material to the result of such proceeding.

The main charge against the appellant is under s. 193 of the Code, *viz.*, the offence of giving false evidence in the said civil suit, upon which the learned Sessions Court judge at the close of the prosecution's case found was proved beyond reasonable doubt and hence called upon the appellant to enter on his defence. As discussed earlier, SP3 denied having been served with the writ of summons at his office in the LUTH Building, Kota Bharu on 30 January 1987 as his office was closed it being a Friday and a public holiday. Furthermore the affidavit of service (exh. P3) stated that 30 January 1987 was a Monday whereas that day was a Friday. It is my view that the learned Sessions Court judge must have called for the defence on the basis he believed the prosecutions' witnesses, especially SP3 and SP4 which would lead to the conclusion that the affidavit of service contain a false statement, *viz.*, that the writ of summons was served on SP3 at his office in the LUTH Building, Kota Bharu on 30 January 1987 whereas the evidence showed otherwise.

In *Baban Singh v. Jagdish Singh* AIR [1967] Cri LJ 6 (SC), in dealing with ss. 191 and 192 and also 199 of the Indian Penal Code, the Supreme Court held that where a false affidavit is sworn by a witness in a proceeding before a court the offence would fall under s. 191 and s. 192. It is the offence of giving false evidence or of fabricating false evidence for the purpose of being used in a judicial proceeding. In that case, Hidayatullah J said (at p. 8):

> The difference between ss. 191 and 199 is this: Section 191 deals with statements and declarations falsely made by a person legally bound by an oath or by an express provision of law to state the truth. Section 199 deals with statements and declarations made voluntarily provided they are capable of being used as evidence and which the Court is bound to receive as evidence.
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> The matter has to be to be considered from three stand points. Does the swearing of the false affidavits amount to an offence under s. 199, Indian Penal Code or either ss. 191 or 192, Indian Penal Code? If it comes under the two latter sections, the present prosecution cannot be sustained. Section 199 deals with a declaration and does not state that the declaration must be on oath. The only condition necessary is that the declaration must be capable of being used as evidence and which any Court of justice or any public servant or other person, is bound or authorised by law to receive as evidence. Section 191 deals with evidence on oath and s. 192 with fabricating false evidence. If we consider this matter from the standpoint of s. 191, Indian Penal Code the offence is constituted by swearing falsely when one is bound by oath to state the truth because an affidavit is a declaration made under oath. The definition of the offence of giving false evidence thus applies to affidavits. The offence may also fall within s. 192. *It lays down inter alia that a person is said to fabricate false evidence if he makes a document containing a false statement intending that such statement may appear in evidence in a judicial proceeding and so appearing in evidence may cause any person who, in such proceeding is to form an opinion upon the evidence, to entertain an erroneous opinion touching any point material to the result of such proceeding.* When Baban Singh and Dharichhan Kuer made declarations in their affidavits which were tendered in the High Court to be taken into consideration, they intended the statements to appear in evidence in a judicial proceeding, and so appearing, to cause the court to entertain an erroneous opinion regarding the compromise. In this way their offence came within the words of ss. 191/192 rather than s. 199 of the Indian Penal Code. They were thus *prima facie* guilty of an offence of giving false evidence or of fabricating false evidence for the purpose of being used in a judicial proceeding.

Looking at the above provisions and the case referred to, I am of the view that the main charge preferred against the appellant under s. 193 of the Code in principle was correct but looking at the case for the prosecution, I would have thought that the facts show more a case of fabricating false evidence as described in s. 192 of the Code rather than a case of giving false evidence as

described under s. 191 of the same. The affidavit of service sworn by the appellant (exh. P3) is clearly a declaration made under oath. The appellant would be committing the offence of fabricating false evidence if that affidavit contains a false statement intending that such statement may appear in evidence in a judicial proceeding and so appearing to cause the court to entertain an erroneous opinion, *viz*., that final judgment can be entered against SP3 as the writ of summons was served on him on 30 January 1987 and he failed to enter appearance after the time limited for appearing, which is 12 days from the date of service pursuant to O. 12 r. 4 of the Rules of the High Court 1980 ("the Rules"). Under the Rules, final judgment as such can be entered under O. 13 r. 1(1). It read:

> Where a writ is indorsed with a claim against a defendant for a liquidated demand only, then, if that defendant fails to enter an appearance, the plaintiff may, after the time limited for appearing, enter final judgment against that defendant for a sum not exceeding that claimed by the writ in respect of the demand and for costs, and proceed with the action against the other defendants, if any.

A question which need to be determined at this appeal is whether the learned Sessions Court judge was correct in ruling that the prosecution has proved its case beyond reasonable doubt when he ordered the appellant to enter on his defence. The difficulty faced here in this appeal is this case was heard by three successive Sessions Court judges. The notes of proceedings show a total of seven witnesses gave evidence during the prosecution's case. The learned Sessions Court judge who heard this case at the outset stopped at witness No. 6, ie, MS Murthi (SP6) who was then in the midst of being cross-examined. As to why she did not continue to hear the case is not clear from the appeal record. The succeeding learned Sessions Court judge took over from where she left and partly heard the evidence given by SP6. He then went on to hear the evidence of SP3 who was recalled for further cross-examination, which right to do so, on record, was allowed by the first learned Sessions Court judge. He then heard the evidence of SP7, the investigation officer of the case after which the prosecution closed its case. After hearing the submissions of the deputy public prosecutor and counsel for the appellant, the succeeding learned Sessions Court judge ruled as follows:

> Setelah mempertimbangkan keterangan yang telah dikemukakan serta penghujahan kedua-dua pihak, saya memutuskan pendakwaan telah berjaya membuktikan kedua-dua pertuduhan terhadap OKT tanpa keraguan yang munasabah. Bagaimanapun, saya hanya mengarahkan OKT untuk membela diri terhadap pertuduhan pertama sahaja.

The proceedings were then adjourned to another date. When the matter came up for continued hearing, yet another succeeding learned Sessions Court judge presided over the matter. What happened to his predecessor, ie, the second learned Sessions Court judge is not clear from the appeal record. At the close of the defence case, the third learned Sessions Court judge amended the main charge to one of fabricating false evidence (reproduced earlier) which was read and explained to the appellant who maintained his plea of not guilty. Counsel for the appellant then made an application to recall witnesses but that was refused by the learned Sessions Court judge. The learned Sessions Court judge went on to find the appellant guilty and convicted him.

Procedurally, there is nothing wrong for a succeeding Sessions Court judge to act on the evidence so recorded by his predecessor and to continue from the point where it has been left behind by him. Section 261 of the CPC meets such a situation and it reads:

> Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in a trial ceases to exercise jurisdiction in it and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his successor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial:
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> Provided as follows:
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> (a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard;
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> (b) the High Court may, whether there be an appeal or not, set aside any conviction had on evidence not wholly recorded by the Magistrate before whom the conviction was had, if that Court is of the opinion that the accused has been materially prejudiced thereby, and may order a new trial.

In *Oh Keng Seng v. Public Prosecutor* [1976] 1 MLJ 143 at p. 144, Ajaib Singh J (as he then was) was of the view that such a provision should be exercised with caution. He said (at p. 144):

> The provision of section 261 of the Criminal Procedure Code which empowers the succeeding magistrate or president to act on the evidence recorded by his predecessor is no doubt intended to save time and money and to expedite the disposal of part-heard criminal cases. This provision however should be exercised with caution. It must be appreciated that the succeeding magistrate or president who acts on the evidence of witnesses whom he has not heard and seen is obviously at some disadvantage particularly in respect of the

demeanour and credibility of those witnesses. There is therefore a real risk that evidence not wholly recorded by a magistrate or president but which is acted on by him may materially prejudice an accused person where a decision involving the credibility of a witness is based on that evidence. The provision however may generally be exercised where the evidence to be acted on is more or less formal or less formal or is largely uncontroversial and where the credibility of any material witness is not involved.

In the instant case the evidence of SP3, without which there would have been no case to answer, was heard partly by the first learned Sessions Court judge and subsequently by the second learned Sessions Court judge who then ordered the appellant to enter on his defence. The notes of proceedings do not show that the second learned Sessions Court judge viewed the evidence adduced by the prosecution objectively before calling on the appellant to enter on his defence. His notes also do not show that he conducted a maximum evaluation of the evidence adduced by the prosecution, following *Khoo Hi Chiang v. Public Prosecutor* [1994] 2 CLJ 151 and *Arulpragasan Sandaraju v. Public Prosecutor* [1996] 4 CLJ 597, before ruling that the prosecution had established the main charge and also the alternative charge against the appellant beyond all reasonable doubt. That was the then standard of proof required of the prosecution at the close of its case prior to the amendment made to s. 180 of the CPC and which amendment came into force on 31 January 1997.

Upon perusing the evidence adduced by the prosecution, I am of the view that there are inconsistencies with regards to the whereabout of SP3 on the morning of 30 January 1987. The third learned Sessions Court judge have not seen or heard the prosecution's witnesses but then his grounds of decision also do not seem to reflect that he has observed such inconsistencies or took into account of material circumstances or probabilities before finding the appellant guilty on the amended charge.

The appellant stated in his affidavit of service that the writ of summons was served on SP3 at about 11.45am on 30 January 1987 and it is the prosecution's case that this is false. SP7, the investigation officer of the case said he was informed by SP3 that the latter was at Istana Dusun, Pasir Mas on that date. SP7 claimed that SP3 did show him his diary (exh. P5) wherein for the date 30 January 1987 there was an entry relating to an UMNO branch committee meeting at 9.30am at Pasir Mas and another entry, but deleted, relating to a shooting competition for one "DYTM of Brunei". SP7 however admitted he did not investigate further as to whether SP3 did attend such a meeting.

In his evidence SP3 denied being served with the writ of summons on 30 January 1987. He went on to say that as 30 January 1987 was a Friday and a public holiday, he would not go to his office. He would be at his house in Pasir Mas and would visit the mosque in Pasir Mas as he was then contending for the post of "Naib Ketua Bahagian" in UMNO. He then said:

> Pada awal pagi saya berada di rumah dan kemudian pergi sembahyang Jumaat dan kemudian itu balik ke rumah semula. Selepas itu saya menunggu kawan dari luar negeri. Pada waktu pagi, kawan saya datang, Ramli bin Ahmad.
>
> Ramli bincang dengan saya hendak pergi ke masjid mana untuk sembahyang.

SP3 agreed he lives in Istana Dusun, Pasir Mas, Kelantan but denied having received two letters of demand from M/s. Murthi & Partners written prior to the filing of the said civil suit against him which were sent to his home address. He also denied having received a copy of the judgment against him which was sent to his office address. In relation to his diary (exh. P5), SP3 agreed there was no entry in his diary as to his whereabouts on the morning of 30 January 1987. What transpired under cross-examination when his diary was referred to him was as follows:

> Q. Pada pagi, ada apa-apa catitan dimana kamu berada?
> A. Tiada.
>
> Q. Dari 8.00 pagi-12.00 tengahari dimana berada?
> A. Di Pasir Mas.
>
> Q. Appointed tetap?
> A. Pagi itu pergi ke sempadan melalui Pasir Mas. Saya pergi dengan Pengeran Subri, adik Sultan Brunei. Saya bawa dia ke sana. Kami pergi Thailand dan balik.
>
> Q. Boleh kemukakan passport untuk sahkan?
> A. Saya tidak pakai passport sebab sampai ke Golok, melalui aturan khas. Bukan border pass.
>
> Q. Siapa kendalikan aturan khas itu?
> A. Saya ikut mereka. Tak tahu siapa atur kemungkinan Imigresen.
>
> Q. Setuju dari 8.00 pagi bertolak?
> A. Lebih kurang 9.00 pagi. Balik dalam lebih kurang 12.00 tengahari. Sampai rumah 12.00 lebih.

What transpired subsequently is the following:

Q. In chief kata tunggu kawan dari luar negeri, "siapa nama".
A. Pengiran Sufri.

Q. Itu pagi atau petang?
A. Saya lupa.

Q. Setuju lupa dan apa?
A. Mula-mula tunggu kawan saya Ramli Ahmad, lepas sembahyang Jumaat tunggu kawan Pengiran Sufri.

Q. Setuju pagi tunggu kawan Ramli Ahmad, lepas sembahyang Jumaat tunggu Pengiran Sufri untuk ke Thailand, jadi pergi Thailand petang?
A. Ya.

What can be seen from the above is that SP3 claimed he went to Thailand in the morning of 30 January 1987 with one Pengiran Sufri but later changed his story and said that that trip was made in the afternoon of the same day. In his evidence, SP4 stated on 30 January 1987 he was with SP3 at the latter's house between 9am and 5pm. After Friday prayers he had lunch with SP3 also at the latter's house. At about 3pm that day one Jeffri, who is an overseas acquaintance of SP3 came to the said house and they then went to Rantau Panjang. They returned after 5pm. He insisted that SP3 did not go his office that day it being a Friday and a public holiday.

In relation to the bankruptcy proceedings, SP3 admitted receiving a letter from the official assignee in 1992 regarding the adjudication order made against him. He claimed he made enquiries with the official assignee's office in Kota Bahru to find out which party was responsible for making him a bankrupt but as the information was not forthcoming he left it at that. Upon receiving the information that he wanted through SP5, which according to SP5 was in 1995, he made the police report. The police report was made on 12 September 1996.

What is clear, based on the main charge, is that the prosecution has to establish that SP3 was not in his office situated in the LUTH Building at about 11.45am on 30 January 1987 and hence would not have met the appellant for personal service of the writ of summons to be effected upon him. Without this piece of evidence, there would have been no case to answer. By ruling that the prosecution has at the close of the prosecution's case proved its case beyond reasonable doubt, it can be inferred that it is the finding of the learned Sessions Court judge that SP3 was not in his office on that morning of 30 January 1987 and hence would not have met the appellant and be served with or be left with a copy of the writ of summons as stated by the appellant in his affidavit of service. This finding would be that of the second learned Sessions Court judge who partly heard the evidence of SP6 and subsequently SP3 who was recalled for further cross-examination. Be that as it may, can the evidence

adduced by the prosecution fit into the main charge framed against the appellant upon which he was called to enter on his defence? That charge, from my reading, can be digested as follows:

(i) that on 13 April 1987 at the High Court (1), Commercial Division, Kuala Lumpur the appellant, gave false evidence for the purpose of it being used in civil suit No. C1-23-3323-86;

(ii) that the false evidence was made in an affidavit sworn by the appellant and filed in the said High Court (the affidavit was attached to the charge);

(iii) that the appellant stated in the affidavit that he did personally serve the writ of summons relating to the said civil suit;

(iv) that the appellant knows that the statement referred to in para. (iii) above is false or does not believe it to be true.

In relation to the framing of a charge under s. 193 of the Code, the commentary in *Ratanlal & Dhirajlal's Law of Crimes* (24th edn) at p. 835 read as follows:

> In framing a charge for giving false evidence, the charge should be precise. The charge should show the particular matter in respect of which the accused is put upon his trial; and only so much of the accused's statements ought to be set out as is necessary in order to show the particular false statements relied on by the prosecution. It should contain a distinct assertion with regard to each statement intended to be characterised as perjury. It should specifically state what words or expressions the accused is charged with having uttered, and in what respect they are supposed to be false. The precise words used by the accused should be recorded, not merely the effect or a paraphrase of those words.

In my opinion the charge as framed in the instant case was not very precise. The affidavit (exh. P3) was sworn by the appellant on 4 April 1987 and it was filed in court on 13 April 1987. The plaintiff in the said civil suit would seem to have entered final judgment pursuant to O. 13 r. 1(1) of the Rules. That judgment order was signed by the senior assistant registrar on 13 April 1987. That, to the prosecution, would be the day the appellant committed the offence of giving false evidence at the High Court, Kuala Lumpur as stated in the main charge. From my reading, the charge seems to be erroneous under the circumstances and based upon that charge, the learned Sessions Court judge was not in a position to call upon the appellant to enter his defence.

Anyway, as discussed earlier, what transpired after the appellant was called to enter on his defence is as follows:

(i) at the close of the defence case and after hearing the submissions, the learned Sessions Court judge altered the charge to one of fabricating false evidence under s. 192 of the Code which offence was committed when the affidavit was sworn before SP2 on 4 April 1997;

(ii) the charge as altered by the learned Sessions Court judge was read and explained to the appellant and he maintained his stand of not guilty;

(iii) counsel for the appellant then applied to recall witnesses but that application was refused; the minutes of the learned Sessions Court judge in relation to this is as follows:

> Melihat kepada pengubahan yang dibuat serta pengakuan tertuduh saya dapati perubahan ini tidak memerlukan pembelaan baru saya akan memberi keputusan saya berdasarkan keterangan yang telah dikemukakan.

The minutes of the learned Sessions Court judge then showed the following:

> Daripada penelitian keterangan saksi-saksi pendakwa terutamanya keterangan pengadu saya mempercayai keterangan yang tertuduh tidak pernah menyerah saman berkenaan ke atasnya pada 30.1.96 seperti dinyatakan dalam afidavit tersebut. Saya mempercayai pada hari tersebut itu yang merupakan cuti am di Negeri Kelantan pengadu tidak berada di pejabatnya seperti dinyatakan oleh tertuduh. Sehubungan ini saya tidak mempercayai keterangan tertuduh atau saksinya bahawa mereka telah pergi ke Kota Bahru Kelantan pada tarikh berkenaan dan berjumpa dengan pengadu dan setelah pengadu enggan menerima saman tertuduh telah meletakkan saman tersebut di depan pejabat pengadu.
>
> Keterangan tertuduh selain dari tidak dipercayai juga tidak menimbulkan sebarang keraguan keatas kes pendakwa. Perkara-perkara penting dalam pembelaan seperti perbualan dengan pengadu tidak ditanya semasa pengadu disoalbalas oleh itu boleh dianggap sebagai after-thought.
>
> Berdasarkan faktor di atas saya mendapati tertuduh salah atas tuduhan terhadapnya dan sabitkannya atas tuduhan tersebut.

Section 158 of the CPC, which has been reproduced earlier, clearly provides the court may at any time before judgment is pronounced alter or add to any charge. But according to Hashim J in *Public Prosecutor v. Tan Kim Kang & Ors* [1962] 28 MLJ 388, it is a course which should be adopted only with great caution. The learned judge said (at p. 389):

> I would like to comment on the powers of the Court under section 158 of the Criminal Procedure Code. Section 158 of the Criminal Procedure Code empowers a Court to "alter or add to any charge at any time before judgment is pronounced". It is permissible under that section to alter the charge after the defence has been called but it is a course which should be adopted only with great caution. I think a safer and better course would be to follow the provisions of section 173(h), (i) and (j) of the Criminal Procedure Code. It is quite clear from these 3 sub-sections that a president or a magistrate should make any alteration or amendment to the charge only at the close of the case for the prosecution.

The learned Sessions Court judge has deemed it fit to amend the charge to one of fabricating false evidence as described under s. 192 of the Code and punishable under s. 193 of the same. In his grounds of decision the learned Sessions Court judge said he altered the charge as he was of the view that the appellant did not give false evidence but made a false affidavit. He said:

> Melihat kepada keterangan dalam kes ini saya dapati pendakwaan terhadap tertuduh bukan kerana memberi keterangan palsu dalam prosiding Mahkamah tetapi membuat satu afidavit yang palsu untuk digunakan dalam satu presiding Mahkamah. Oleh itu tuduhan yang lebih tepat ialah mereka keterangan palsu untuk digunakan dalam satu perbicaraan kehakiman.

I find nothing wrong with the exercise of such a discretion but what has surfaced arising from that is whether the learned Sessions Court judge was correct in summarily dismissing the application of counsel for the appellant to recall witnesses after the charge was amended. In his grounds of decision in relation to this, he said:

> Saya seterusnya mendapati tuduhan pindaan itu tidak memerlukan keterangan yang lanjut memandangkan ia adalah berdasarkan fakta yang sama dan oleh itu saya telah meneruskan dengan keputusan saya. Bagi mencapai keputusan dalam kes ini saya telah mengambil kira perkara yang paling menonjol iaitu hari penyerahan saman merupakan satu pelepasan am di Kelantan dimana semua pejabat akan ditutup pada hari itu. Melihat kepada hakikat ini saya tidak dapat menerima keterangan tertuduh bahawa ia telah menyerah saman di pejabat SP3.
>
> Satu perkara yang menimbulkan ketidakpercayaan saya terhadap keterangan tertuduh ialah apabila ia menyatakan keadaan di Kota Bharu adalah seperti biasa dimana banyak pejabat buka pada hari itu. Ini tidak mungkin berlaku kerana adalah biasa dimana mana pada hari kelepasan am keadaan bandar akan lenggang terutamanya di pejabat-pejabat swasta mahupun Kerajaan. Tertuduh juga telah mengakui ada berlaku kesilapan dalam afidavitnya terutama mengenai hari penyerahan.

> Selain dari tidak mempercayai keterangan tertuduh saya juga dapati keterangannya dan keterangan SD2 tidak menimbulkan apa-apa keraguan munasabah di atas keterangan saksi-saksi pendakwaan terutamanya keterangan SP3.
>
> Saya mempercayai keterangan SP3 yang ia tidak pergi ke Pejabat dan berada di rumah pada 30.1.87. Berdasarkan perkara ini saya telah dapati tertuduh bersalah atas tuduhan terhadapnya.

I am of the view it is wrong for the learned Sessions Court judge to just summarily reject the application of counsel for the appellant to recall witnesses. Section 162 of the CPC read:

> Whenever a charge is altered or added by the Court after the commencement of the trial the prosecutor and the accused shall be allowed to recall or re-summon and examine, with reference to the alteration or addition, any witnesses who may have been examined, and may also call any further evidence which may be material.

From my reading, s. 162 of the CPC seems to be a mandatory provision, *viz.*, that the accused shall be allowed to recall any witnesses. In my opinion, what the learned Sessions Court judge should have done is to enquire into the reason for the application of counsel for the appellant to recall witnesses and allow him identify to the court which witnesses he wants to recall instead of summarily dismissing the application as reflected in the notes of proceedings. Since it is a mandatory section, I would think that the trial is vitiated as a result of the refusal by the learned Sessions Court judge without enquiring into the reason for the application.

Another matter reflected in the learned Sessions Court judge's grounds of decision which attracted my attention is the fact that, he has imported personal knowledge which is not backed by evidence in his attempt to reinforce the finding of the court at the close of the prosecution's case, *viz.*, that since it was a public holiday in Kelantan on 30 January 1987, all offices were closed and hence he could accept the claim of the appellant that he served the writ of summons on SP3 on that day. He also went on to say that he could accept the appellant's claim that on that day the situation in Kota Bharu was "biasa" as on all public holidays, the town would be quiet and there would be no activity in the offices of the private sector as well as Government offices. He noted further that the appellant admitted that he made a mistake in his affidavit by stating that 30 January 1987 was a Monday whereas it was actually a Friday. In *Ganapathy Rengasamy v. Public Prosecutor* [1998] 2 CLJ 1 at p. 7 Shaik Daud JCA said:

It needs to be remembered that however weak a defence may be, trial judges being judges of both fact and law should not brush aside the defence on the basis that the prosecution witnesses are to be believed and not the defence. Where the law casts the onus of giving an explanation upon an accused person, and the explanation is given, which is consistent with innocence, the court is duty bound to consider whether it might reasonably be true, although not convinced of its truth. On the issue of the court's duty to consider the defence, the age old decision in *Mat v. PP* [1963] 29 MLJ 263 is still good law today as it was then. This was followed by the Supreme Court in *Mohamad Radhi bin Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC.

I have for the following reasons allowed the appeal by setting aside the conviction and acquitted and discharged the appellant, namely:

(i) the main charge preferred against the appellant was wrongly framed as the prosecution's case do not at all show that the appellant gave evidence on 13 April 1987 at the High Court, Kuala Lumpur and that being so, the appellant should not have been called upon to enter on his defence;

(ii) further, there is nothing to show that the learned Sessions Court judge has carried out a maximum evaluation of the evidence adduced by the prosecution, especially in relation to the evidence of SP3 when he ruled that the prosecution has proved its case beyond reasonable doubt at the close of its case;

(iii) the summary dismissal of the appellant's application to recall witnesses when the charge was amended is erroneous and has occasioned a miscarriage of justice.